

Upon receipt of the evidentiary depositions of Dr. Do and claimant the ALJ then issued the Order dated December 2, 2008. The ALJ again determined the record fails to

establish an intervening accident sufficient to break the chain of causation from claimant's work injury.

Respondent requests review and argues the evidentiary record establishes that claimant's current need for medical treatment for his low back is the result of the June 20, 2008, intervening motorcycle accident.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

It was undisputed that claimant injured his low back on August 28, 2007, while working for respondent. Claimant received medical treatment which included medications, physical therapy and three lumbar epidural steroid injections. On February 20, 2008, claimant was seen by Dr. Paul Stein and claimant was continued on his medications. At a follow-up appointment on March 5, 2008, claimant was provided treatment recommendations including physical therapy, trigger point injections and referral to a physiatrist.

Claimant was referred to Dr. Sandra Barrett who saw claimant on April 30, 2008. Although claimant complained of continuing low back pain Dr. Barrett determined he was at maximum medical improvement. On May 28, 2008, claimant was seen by Dr. Pedro Murati who recommended claimant receive additional treatment consisting of cortisone injections, physical therapy, anti-inflammatory medications and a diskogram.

Claimant was involved in a motorcycle accident on June 20, 2008. He was struck by a car which laid the motorcycle on its side and claimant hit his head on the pavement. Claimant was life flighted by helicopter to Via Christi Medical Center in Wichita, Kansas. The emergency room doctor ordered tests and scans due to possible head trauma and complaints of neck and back pain. Claimant was admitted to the hospital for observation. Claimant testified that other than cleaning up his head wound and conducting scans he really did not receive additional treatment as a result of the motorcycle accident. Claimant described his injuries from the motorcycle accident as head trauma and "road rash" on his right shoulder and hand.

Claimant testified that between April 30, 2008, and his motorcycle accident on June 20, 2008, he was still having problems with his low back which included pain radiating down his right leg.

Q. Did you notice any change in your low back condition after the motorcycle accident?

A. No, I didn't. It felt pretty -- it felt the same as what it did prior.

Q. Did you have any increase in your pain at all?

A. I have increase all the time. Even before that. It gets better and then it gets worse, since August of 2007.

Q. Since your motorcycle accident in June, have you had basically the same symptoms with your right leg, with the pain with it, or has it changed at all?

A. It's pretty much the same as it was prior.¹

On September 12, 2008, the ALJ ordered an independent medical examination by Dr. Pat Do, board certified orthopedic surgeon, to determine whether or not claimant's current complaints or need for treatment is causally related to the original injury which occurred on August 28, 2007, as opposed to the motorcycle accident on June 20, 2008.

Dr. Do performed a physical examination on October 23, 2008, reviewed medical records, took claimant's history and recommended a diskogram trigger point injections and an airform back brace. If the diskogram is positive then a surgical evaluation is needed. At the time of Dr. Do's evaluation, the claimant would be at maximum medical improvement if the surgical evaluation was negative. The doctor placed temporary restrictions on claimant of no lifting greater than 20 pounds occasionally or 10 pounds frequently; no pushing or pulling greater than 50 pounds occasionally and 25 pounds frequently; no climbing ladders; no frequent kneeling, squatting, sitting, standing or walking; and only occasional 90 degree bending at the waist as well as twisting and turning or stair climbing. Dr. Do opined that claimant's current back complaints are causally related to the accidental injury of August 28, 2007. Dr. Do also agreed that the motorcycle accident aggravated, intensified and accelerated claimant's low back pain.

The ALJ analyzed the evidence in the following fashion:

While Dr. Do has acknowledged that Claimant's June 20, 2008 motorcycle accident could have resulted in an aggravation, acceleration or intensification of Claimant's low back pain, he largely defers to Claimant's opinion that there was only a temporary increase in back and neck pain following the motorcycle accident. The record thus fails to establish an intervening accident sufficient to break the chain of causation from the Claimant's work injury.²

This Board Member agrees and affirms. The claimant described continuing low back pain after released from treatment by respondent. He had obtained a medical opinion

¹ Horton Depo. at 15.

² ALJ Order (Dec. 2, 2008) at 1.

which recommended additional treatment before the motorcycle accident occurred. And claimant noted that his low back pain remained the same after the motorcycle accident.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated December 2, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

³ K.S.A. 44-534a.

⁴ K.S.A. 2007 Supp. 44-555c(k).